LONDON OVERSEAS CONFIRMERS LTD.

v.

NGEOW SAI KOW & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 2081 OF 1982]
19 DECEMBER 1983

CIVIL PROCEDURE: *Judgment in default of appearance - Application to set aside - Delay in application - Effect - Claim based on dishonoured bills of exchange - "Extension commission" - Whether plaintiffs had cause of action.*

The plaintiffs and Fong & Company, under which name the defendants carried on business, arrived at an agreement, the terms of which were contained in the plaintiff's letter dated 23 April 1980 "NSK-1" whereby the plaintiffs were to provide financing for the benefit of Fong & Company in respect of their business. Three of the bills issued by Fong & Company in favour of the plaintiffs for payment made by the plaintiffs were dishonoured on presentation. Later certain sums were paid to the plaintiffs, who credited the amounts to the dishonoured bills. The plaintiffs caused a writ to be issued on 29 October 1982. The claim was in respect of the balance due on the bills, including interest and "extension commission". Judgment in default was entered against the 1st defendant on 13 January 1983. An application to set aside the judgment was filed by the 1st defendant on 20 July 1983.

Held:

[1] The affidavits filed in support of the application to set aside the default judgment and explaining the delay in application were vague and grossly inadequate, self-contradictory and implausible. *(Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212, 217).

[2] However, the bills of exchange did not give the plaintiffs a cause of action to sue for any extension commission. The causes of action relied on by the plaintiffs appeared to be the dishonour of the bills of exchange and not on any breach of NSK-1, and on the face of the bills of exchange there was no provision for imposing such a commission.

[3] Therefore, the 1st defendant should be given the opportunity to have that part of the claim pertaining to the extension commission tried. The gross delay in the application to set aside the default judgment should not, on the facts of the case, preclude the defendants from the trial they sought.

[4] The defendants should, however, be punished by terms as to costs. *(Evans v. Bartlam* [1937] AC 473, 489).

[5] That aspect of the default judgment, that the interest (and the extension commission) was to run from 2 October 1982 until 14 days after payment, appeared to be patently incorrect and equivocal and could not be allowed to stand. Default judgment set aside. All costs of the application and incidental to it and costs of the pending execution proceedings to be paid by the 1st defendant in any event.

[Default judgment set aside.]

Cases referred to:

Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212
Evans v. Bartlam [1937] AC 473

For the 1st defendant/applicant - Teh Boon Eng; M/s. Sri Ram, Zulkifly & Kumar
For the plaintiffs/respondents - K.H. Koh; M/s. Uppal & Koh

JUDGMENT

VC George J:

The plaintiffs and Fong & Company (under which name and style the defendants carried on business) arrived at an agreement in the terms contained in the plaintiffs' letter dated 23 April 1980 to Fong & Company (Exhibit NSK-1 to Ngeow Sai Kow's affidavit affirmed on the 2 September 1983) whereby the plaintiffs were to provide financing for the benefit of Fong & Company in respect of goods imported into Malaysia by them.

Fong & Company were to pay the plaintiffs such amounts that were disbursed by the plaintiffs on behalf of Fong & Company together with bank charges and fees, interest and commissions as set out in the said letter NSK - 1. The payment by the plaintiffs were to be covered by bills of exchange to be drawn from time to time by the plaintiffs against Fong & Company.

Three such bills of exchange were dishonoured on presentation. Thereafter certain sums of money were paid to the plaintiffs who accepted them to account of the amounts owing crediting the amounts paid to one or the other of the said dishnoured bills. There has been some complaint about this but in the absence of directions to the contrary, that was a matter left entirely to the discretion of the plaintiffs and the 1st defendant cannot be heard to complain about it.

The writ was caused to be issued on 29 October 1982.

The statement of claim suggests that the causes of action relied on are the dishonour of the three bills of exchange and not breaches of NSK-1. The claim is in respect of the balance due on the bills including interest and what is described as "extension commission". It is to be noted that on the face of the bills of exchange there is no provisions for imposing such a commission.

The first named defendant Ngeow Sai Kow was duly served with the writ. He did not enter an appearance and judgment in default in the terms of the prayers in the statement of claim was entered against him on 13 January 1983.

The 1st defendant's solicitors were informed of the fact that the default judgment had been entered in January itself. The application to set aside the judgment was however filed only on 20 July 1983.

What was said to be an explanation for the delay was given. The suggestion seems to be that the plaintiffs' solicitor had lulled the 1st defendant's brother into a feeling that there was no need for the 1st defendant to have the judgment set aside. I say "seems to be" as the contents of the affidavits filed in support of the application are vague and even contradictory. It is said that the advice of solicitors was not sought but it would seem that at all relevant times there were solicitors acting for the 1st defendant. It is not denied that as early as 19 January 1983 those solicitors were informed by the plaintiffs' solicitors that default judgment had been entered. The suggestion that the 1st defendant and/or his brother were lulled into a state of complacency cannot be true. The fact that default judgment was entered should have jolted them awake and to the realisation that the negotiations for a settlement had come to naught.

I was left with the impression that the 1st defendant had at best a vague idea of what had been happening. He appears to be used as a front man by his brother Ngeow See Fong. It is significant that the 1st defendant is described in the particulars lodged with the Registrar of Businesses in respect of Fong & Company as a "sleeping partner". There has not been any affidavit by Ngeow See Fong. Such affidavits that were filed in support of the application bring to mind what Lord Diplock had to say of an affidavit filed in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 at 217. I too find the assertions made in the affidavits filed in support here to be vague, self-contradictory and implausible. In fact in the first affidavit in support of application the 1st defendant is seen to be telling what cannot be true. He talks of an agreement having been arrived at with the plaintiffs resulting in the handing over of post-dated cheques which he says resulted in the original suit being withdrawn. That may be true but he then goes on to state that he was given the impression that Civil Suit No. C 2081 of 1982 (which is the instant action) was stayed as a result of that agreement and that it was because of the agreement that an appearance was not entered. The first of the post-dated cheques was dated 3 April 1981 and 2 October 1982. The writ was caused to be issued on 29 October 1982. It is obvious that whatever happened that resulted in the post-dated cheque being handed to the plaintiffs took place prior to April 1981. The agreement that the 1st defendant was talking about, if there was an agreement, must have taken place prior to April 1981 and its terms could not have included one that stayed the action C 2081 of 1982 or that could possibly lull the 1st defendant into not entering an appearance in that action. Such an action was probably not even thought of prior to April 1981.

However in spite of those grossly inadequate affidavits said to be filed in support of the application to set aside the default judgment I find myself unable to avoid ignoring the fact that the bill of exchange did not give the plaintiffs a cause of action to sue for extension commission. The affidavit of Doreen Tan shows that the plaintiffs relied on an agreement the terms of which it was averred are set out in the letter NSK-1 and one term of which was supplemented by a later oral agreement which contention is a fact in dispute. As the only cause of action relied on in the statement of claim are the rights moving from the bills of exchange the 1st defendant should be given the opportunity to have that part of the claim pertaining to extension commission tried. The gross delay in applying to set aside the default judgment should not on the facts of this case preclude the defendants from the trial they now seek. But they should be "punished by terms as to costs" (following Lord Wright in *Evans v. Bartlam* [1937] AC 473, 489)

Another aspect of the default judgment that cannot be allowed to stand (in that it appears to be patently incorrect and equivocal) is that the interest (and extension commission) is to run at 13.5% per annum and 2% per mensem from 2nd October 1982 until 14 days after payment.

The default judgment is set aside and will be replaced by a judgment in terms that will enable the issue of "extension commission" to be tried and which will do away with patent errors and obvious equivocations. The terms of the judgment will be settled by me after I have further heard Counsel on what is meant by "interest to run until 14 days after payment."

I am told that the plaintiffs have commenced execution proceedings which may have to be re-commenced or be subjected to amendments.

All costs of this application and incidental to it and the costs of the pending execution proceedings and of any amendments that may have to be made thereto shall be paid by the 1st defendant in any event.

Adjourned to a date to be fixed.

Also found at [1984] 1 CLJ 266